

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

PATRICK A. GUARDIOLA,	§	
	§	
VS.	§	CIVIL ACTION NO.4:11-CV-159-Y
	§	
RICK THALER,	§	
Director, T.D.C.J.	§	
Correctional Institutions Div.	§	

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS  
AND ORDER DENYING CERTIFICATE OF APPEALABILITY

In this action brought by petitioner Patrick A. Guardiola under 28 U.S.C. § 2254, the Court has made an independent review of the following matters:

1. The pleadings and record;
2. The proposed findings, conclusions, and recommendation of the United States magistrate judge filed on April 27, 2011; and
3. The petitioner's written objections to the proposed findings, conclusions, and recommendation of the United States magistrate judge filed on May 19, 2011.

The Court, after **de novo** review, concludes that the Petitioner's objections must be overruled, and that the petition under § 2254 should be dismissed for lack of jurisdiction, for the reasons stated in the magistrate judge's findings and conclusions.

Therefore, the findings, conclusions and recommendation of the magistrate judge are ADOPTED.

Petitioner Patrick A. Guardiola's petition for writ of habeas corpus is DISMISSED for lack of jurisdiction.

*Certificate of Appealability*

Federal Rule of Appellate Procedure 22 provides that an appeal

may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253.<sup>1</sup> Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."<sup>2</sup> The COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."<sup>3</sup> A petitioner satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."<sup>4</sup>

Upon review and consideration of the record in the above-referenced case as to whether petitioner Guardiola has made a showing that reasonable jurists would question this Court's rulings, the Court determines he has not and that a certificate of appealability should not issue for the reasons stated in the April 27, 2011, Findings, Conclusions, and Recommendation of the United States Magistrate Judge.<sup>5</sup>

Therefore, a certificate of appealability should not issue.

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<sup>1</sup>See Fed. R. App. P. 22(b).

<sup>2</sup>RULES GOVERNING SECTION 2254 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS, RULE 11(a) (December 1, 2009).

<sup>3</sup>28 U.S.C.A. § 2253(c)(2)(West 2006).

<sup>4</sup>*Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003), citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

<sup>5</sup>See Fed. R. App. P. 22(b); see also 28 U.S.C.A. § 2253(c)(2)(West 2006).

SIGNED May 23, 2011.

  
TERRY R. MEANS  
UNITED STATES DISTRICT JUDGE